IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 590 of 2005

WITH

CIVIL APPLICATION NO. 1010 of 2005

Mohammed Fareeduddiin Salahuddin
Shaikh .. Appellant

versus

Iftekar Ahmed Limboowala & Anr. .. Respondents

...

Mr.S.S. Salunkhe for the appellant.
Mr.Vipin Kamdi for the respondent no.1.
Mr. Sachin Dhakephalkar with Mr.R.M. Pawar for the respondent no.2.

CORAM : B.H. MARLAPALLE,J

DATED : 12th September 2005

ORAL JUDGEMENT :-

1. Pursuant to the order dated 1st August 2005 passed by Supreme Court in SLP (Civil) No.14589 of 2005, Civil Application no. 1010 of 2005 came to be filed in this appeal, praying for final decision in Civil Application no.580 of 2005, by the appellant - original plaintiff. Rule was granted in CA No. 580 of 2005 and the impugned order dated 17th February 2005 was stayed during the pendency of the appeal and the earlier order dated 14th January 2005 was directed to be continued.

2. Being aggrieved by the order dated 30th June 2005 in Civil Application No.580 of 2005, defendant no.2 had approached the Supreme Court in SLP (Civil) 14589 of 2005. In CA no.580 of 2005, the appellant plaintiff has prayed for stay to the impugned order dated 17th February 2005 passed by the trial Court in Notice of Motion no. 348 of 2005 filed in S.C. Suit no.121 of 2005, during the pendency of the appeal and for appointment of the Court Receiver under Order XL of the Code of Civil Procedure so as to take possession of the suit premises being Shop No.3,

Meenu Villa (Old Name Kareem Cottage), H.No.78, Bazar road, Bandra (West).

3. For finally deciding CA no.580 of 2005, the moot question was regarding possession of the plot in respect of the suit premises as on the day the suit was filed. It appears that S.C. Suit no.121 of 2005 was filed on or about 8.1.2005 and the Notice of Motion no.348 of 2005 was taken out for orders on 12th January 2005. The learned Advocate for the plaintiff was directed to issue Advocate's notice to the defendants and the Notice of Motion was to be taken out for ad-interim orders on 14th December 2005. The plaintiff's Advocate made a statement before the trial Court on 14th January 2005 that a copy of the Notice of Motion was served by the plaintiff on defendant no.2 in the evening of 11th January 2005 but the said defendant failed to appear before the Court. The trial Court therefore proceeded to pass an ex-parte order of protection by way of ad-interim relief, in terms of prayer clause (a) of the Notice of Motion, but only against defendant no.2 on 14th January 2005. The defendant no.2 on receipt of the ad-interim order filed Notice of Motion no. 348 of 2005 and prayed for vacating

the ad-interim order as well as dismissal of Notice of Motion no. 537 of 2005. The trial Court noted its satisfaction in the impugned order dated 13th February 2005 that the defendant no.2 was not served by the plaintiff and in any case, the service sought to be made or alleged was not complete. On the point of possession as on the date which the suit was filed, the trial Court held that the plaintiff was not in possession and on the basis of the ad-interim order, the defendant no.2 was dispossessed. There is no dispute that the defendant no.1 is in possession of the suit premises as at present.

4. The learned counsel for the plaintiff at the threshold pointed from the copy of the memo of appeal before the Supreme Court that the defendant no.4 sought to mislead the Apex Court by alleging that the order in C.A. no.580 of 2005 passed on 13th June 2005 was ex-parte. The farad sheet in C.A. no.580 of 2005 shows that the defendant no .2 was represented by Mr.R.A. Thorat, the learned Advocate when the order dated 13th June 2005 was passed by this Court. Be that as it may, this appeal centres around the main point as to whether the plaintiff was in possession prima facie, on the date when he filed

this suit.

5. The plaintiff maintains that he was in possession of the suit premises on the day the suit was filed and was dispossessed after his Notice of Motion was dismissed on 17th February 2005, forcibly by defendant no.2 whose allegations are supported by defendant no.1 who is the landlord of the suit premises from June 2003 onwards. As per the plaintiff, the suit premises were put in his possession by defendant no.2 on payment of the consideration of Rs.2,65,000/- and she had surrendered her tenancy in favour of the plaintiff. The plaintiff was handed over the possession of the suit premises along with the business therein which was being run by defendant no.3 and/or by her husband. The plaintiff also contends that the defendant no.1 purchased the suit premises from the earlier owner and accepted the plaintiff as the tenant. Rent receipts for the period prior to January 2005 have been relied upon in support of his contentions.

6. The defendant no.2 on the other hand claims that she never parted with the suit premises along

with its business in favour of the plaintiff and she alleges that the defendant no.1 has joined hands with the plaintiff. The defendant no.2 has placed on record copies of certain documents like electricity bills, receipts of taxes paid to the Municipal Corporation and licence under the Bombay Shops and Establishments Act. The learned Counsel for the plaintiff submitted that these documents are unreliable even prima facie because the defendant no.2 after receiving the copy of the ad-interim order dated 14th January 2005, she approached the various authorities and collected duplicate copies of the bills and payments have been made hereafter. Thus, both the parties are claiming that each of them was in possession of the suit premises as on the date the suit was filed before the trial Court.

7. The learned counsel for the respective parties finally agreed that the possession of the suit premises as on the date the suit was filed is a mixed question of fact and law and it is required to be decided on the basis of the evidence that may be adduced by the respective parties. It is apparent from the order passed by the Apex Court that the defendant no.2 is in possession of the suit premises

as at present. The learned counsel for the respective parties therefore urged for the disposal of the appeal by directing an expeditious trial of the pending suit which is filed for permanent injunction, more so when the adjudication involves the main question of possession as on the day the suit was filed.

8. Hence, the appeal is disposed of in terms of the following order :-

a) S.C. Suit no.121 of 2005 be heard and decided as expeditiously as possible and preferably by 31st January 2006.

b) The status quo in respect of the possession of the suit premises as at present shall be continued till the suit is decided and this possession shall not in any way influence the final decision in the suit.

c) Civil Application no.580 of 2005 stands dismissed and the Rule granted therein is hereby discharged.

d) Civil Application no. 1010 of 2005 does not survive.

9. Undertaking of both the parties that they shall co-operate with the trial Court for the disposal of the suit within the time limit specified is hereby recorded.

10. Writ to go to the trial Court forthwith.

B.H. MARLAPALLE, J